

Presidential National Security Powers

War and Emergency Powers



Why didn't Congress declare war when Fort Sumter was fired on?



What did Lincoln Order that lead to the Prize Cases?



Who were the plaintiffs in the Prize cases, i.e., what was their interest in the case?



Who must pay the damages if the plaintiffs prevail?

The Prize Cases, 67 U.S. (2 Black) 635 (1863)

- What precipitated this case?
 - Ships were seized and sold for prizes under Lincoln's blockade order.
- What is the plaintiff trying to get in this case?
 - The value of the ships and cargo
- Why didn't the president go to Congress for a declaration of war?
 - Congress was out of session.
- Who must pay the damages if the plaintiffs prevail?
 - The captain of the ship.

What is Plaintiffs' Legal Argument?

- Plaintiffs argue that only Congress can declare war, and that jus belli requires that there be a war before a blockade and seizure orders can be legally issued.
- Since Congress did not declare war, Lincoln's order was not valid and thus there was no legal authority to seize the ships.
- Under jus belli, the captain is required to pay back the value of the ship and cargo that was awarded as a prize.

What is Jus Belli?

- Traditional international law of war
- Mostly about shipping and trade during wars
- Nations agree to it because of the mutual benefit of being able to conduct shipping with non-warring parties during wars
- Key international law principle
 - As we will discuss later, there is no enforcement mechanism for international law.
 - Nations accept it because of mutual benefits or coercion by other nations.

What does Jus Belli Require?

- A war
- Formal or perfect war
 - Declared by both sides so everyone knows who is at war
- Informal or imperfect war
 - The walks like war, sounds like a war test
- Jus belli has always recognized that people start wars without formal declarations, and that requiring a formal declaration to trigger the law of war would create a loophole.

The Law of Prize and Capture

- Jus belli recognizes the prize and capture and rewards for recapture
- It does not specify the workings of the finance – that is left to the countries.
- The US, in theory, continues to accept jus belli, as modified by international treaties.
- The US eliminated prizes and capture more than 100 years ago.



What law would now govern the illegal taking or destruction of a privately owned ship?

Issues before the Court

- Can the president legally use troops without a declaration of war?
- Is a declaration of war necessary to meet the terms of jus belli?

Is there a statutory provision recognizing that the president might need to respond to attack without Congressional action?

- But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.
- Is the firing on Fort Sumter an insurrection?
- Would this authorize the blockade?

Does jus belli require a declaration of war or other legal authorization?

- And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be “unilateral.” Lord Stowell (1 Dodson, 247) observes, “It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.”

Ratification

- Did Congress authorize the action once they were back in session?
- How does the majority treat this ratification?
- Does the majority say that this authorization was necessary for the president's actions to be legal?
- Ratification, explicit and implicit (through funding authorizations), will be explored later in the course.

The Dissent

- Assuming that it was necessary, what was the dissent's problem with a post action authorization?
- Why does the majority reject this position?
- Has this view prevailed?
- What did the dissent say was necessary before the president could take this as an emergency action?
- How do the dissenters see this action in the absence of a declaration of war?

Can the Defensive War Power Be Abused?

- Abraham Lincoln offered this warning about the President's invocation of his "repel attack" authority to fight the undeclared Mexican War of 1846:
- Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after you have given him so much as you propose.

Note 3 - Repealing Invasions

Martin v. Mott - 1813

- Congress passes a law saying the president can repel invasions and deal with insurrections.
- What does the Court say about who gets to decide if there is an invasion?
 - the Court found the President to be “the sole and exclusive judge whether the exigency has arisen” that would justify invocation of the statute, and it implied the unsuitability of such a determination for judicial review. “Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts,” the Court explained, “it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”
- This continues to be the rule when Congress leaves the decision to the president without imposing statutory limits.

Customary War Power

Unilateral Presidential Uses of Military Power



What did Hamilton and Madison Think about Limiting the President's War Powers?

- Alexander Hamilton wrote in The Federalist No. 23 that it was undesirable to impose “constitutional shackles” on “the power to which the care of [the safety of the nation] is committed,” because “it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of means that may be necessary to satisfy them.”
- James Madison also noted in The Federalist No. 41 that [t]he means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it places in the Constitution itself necessary usurpations of power; every precedent of which is a germ of unnecessary and multiplied repetitions.

May the President use armed force whenever he thinks it necessary to protect national security?

- The Legal Adviser to the State Department inferred from 125 prior congressionally unauthorized uses of armed force abroad that the President has the “power to deploy American forces abroad and commit them to military operations when [he] deems such action necessary to maintain the security and defense of the United States.”

What do different scholars think of the Presidential War Power?

- No contemporaneous congressional interpretation attributes a power of initiating war to the President. The early Presidents, and indeed everyone in the country until the year 1950, denied that the President possessed such a power. There is no sustained body of usage to support such a claim. OR
- To my mind, this historical development of our institutions has settled the legitimacy of “inherent” presidential power to commit the armed forces to hostilities. A practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue.

Why should we care about Theories of War Powers?

- If Professor Monaghan's theory is that exercise of the war power is negotiated between the branches, what is the point of studying legal limits on war powers?
- Is what the political branches negotiate not then constitutional per se, and does the President not hold all the cards in the negotiations?
- How do constitutional claims, international law doctrines, and past military precedents fit into the next negotiation?

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)

- Who is the defendant?
- What did he do?
- What did the statute provide?
 - The 5th section of this act authorizes the President of the United States, to instruct the commanders of armed vessels, “to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound or sailing to any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.”
- Was this ship bound for France?
- Why did the captain think he could seize a ship headed from a French port?

The Legal Issues

- What legal theory did the ship's owners use to sue the Captain?
- Had there not been a law, would this have been within the president's powers?
- What is the effect of the law in this courts' view?
 - Nor did they give the Commander in Chief any constitutional right to ignore the terms of a congressional authorization for the use of force. When Congress gives the President the authority to conduct war, he or she must conduct it within that authority, just as the President must follow any law that is constitutionally made.
- Stay tuned for the War Powers Resolution

The Mexican War: Fleming v Page

- President orders seizure of a Mexican port
 - Remember the Halls of Montezuma in the Marine Hymn?
- What is the president's legal role in directing the seizure?
 - Military commander or policy maker?
- Does the president's seizure of the port make it US territory?
 - Only Congress can authorize addition of territory to the US.

Congressional Limitations in the Torture Memos

- Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States. (Bybee)

9/11 and War

- What does War on Terror mean in the context of formal and informal war?
 - Does it satisfy the international law standard that states understand who is at war and who is not?
 - Can it ever be ended?
 - Why is this legally significant?
- Who is the enemy in the War on Terror?
- What does it mean to a prisoner of this sort of war?

The President's Domestic Emergency Powers

What are the Four Mentions of Emergency Powers in the Constitution?

- Suspension Clause provides that “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” U.S. Const., art. I,
- The Calling Forth Clause authorizes Congress to “provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.” Id. art. I, §8, cl. 15
- Article I, §10, cl. 3 provides that a state may not engage in war “unless actually invaded, or in such imminent danger as will not admit of delay.”
- Article IV, §4, provides that the United States shall protect a state against “domestic Violence” “on Application of [its] Legislature, or of the Executive (when the Legislature cannot be convened).”

Statutory Grants of Emergency Powers

- Most exercises of emergency powers are under statutory grants of authority.
- These raise 3 issues:
 - What is necessary to trigger the emergency powers?
 - What powers are granted during the emergency?
 - What terminates the emergency?
- There is an ancillary issue of how the president pays for the emergency actions.
 - Some emergency law such as the Stafford Act include funding.
 - Others provide for reallocation of existing funds.
 - Some are silent.

National Emergencies Act

- § 1621. Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation
- (a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.
- Is there any intelligible principle here to guide the court if asked to review the act?
- Must it then only be a procedural review?

What Must Be in the Declaration

- § 1631. Declaration of national emergency by Executive order; authority; publication in Federal Register; transmittal to Congress
- When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

Termination of the Emergency



- (d) Automatic termination of national emergency; continuation notice from President to Congress; publication in Federal Register
- Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary
- The act included an unconstitutional legislative termination of emergencies.

How Can Congress Terminate Emergencies

- Congress must pass a law (joint resolution) and get it signed by the President
- Congress passed a joint resolution ending the border wall emergency, but the president vetoed it.
- Thus the president can continue an emergency indefinitely.
 - The court will not terminate it because it has no standard to judge whether the emergency exists.

Are Presidential Emergency Powers Implicit?


- What does this mean:
 - Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.



Would you be interested in asynchronous course offerings in the summer?

A Yes

B No



Would you be interested in asynchronous upper division course offerings during the regular semesters?

A Yes

B No

In re Neagle, 135 U.S. 1 (1890)

- What happened and what is the court reviewing?
 - The protection of a Supreme Court Justice riding the circuit.
 - Why does pretty much assure the result?
- Did Congress forbid this action?
- How does the court justify this with section 2, article 3, the "take care" clause?
- Could a sheriff in CA do this under CA law?
 - Why is this relevant to the federal case?
 - Marshalls can do what other law enforcement can do in a jurisdiction.

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 425-426 (1934)

- Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the powers of the States were determined in the light of emergency and they were not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.
- Was this a court that supported the president?
- Is it representative of the more current courts?



Saving the Union

- Think about Lincoln's question of whether we can save the Constitution but lose the nation.
- What does it mean to say that the president has the power, but not the legal authority, to act in domestic emergencies?
- What can happen if he does acts unconstitutionally?
 - Can congress limit these emergency powers?
 - Do you think the court will intervene?
- Is this better than having congress give him unlimited emergency powers?



Where did the Emancipation Proclamation free the slaves?





What would be the legal problem if Lincoln had used his emergency powers to free the slaves in the states under Union control?

The Emancipation Proclamation

- Where did this free the slaves?
- Why does this matter?
- What would be the legal problem if he freed the slaves in the North?
- What did free the slaves in the North?
- Why did it need to be a constitutional amendment?